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THIS DISPOSITION IS NOT
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Asahi/America, Inc.

Serial No. 75/242,352

Anthony J. Casella and Ludomir A. Budzyn of Casella &
Hespos for Asahi/America, Inc.

Chad Smith, Trademark Examining Attorney, Law Office 104
(Sidney Moskowitz, Managing Attorney)

Before Cissel, Chapman and Rogers, Administrative Trademark
Judges.

Opinion by Rogers, Administrative Trademark Judge:

Asahi/America, Inc. filed an application to register
the mark AF SERIES for goods identified as "backwashable
industrial filtration machine for removing suspended solids
from corrosive liquids."¹ The application includes a
disclaimer of SERIES apart from the mark as a whole.

¹ Serial No. 75/242,352, as amended to International Class 11,
filed February 13, 1997, and based on applicant's claim of a bona
fide intention to use the mark in commerce.

The Trademark Examining Attorney made final a refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d). The basis for the refusal is that AF, in stylized form, has already been registered for "air and liquid filtration units for the industrial market," so that if applicant's mark is used on or in connection with its identified goods, it would be likely to cause confusion or mistake, or to deceive.² The mark in the cited registration appears below.



Applicant has appealed. Both applicant and the Examining Attorney have filed briefs and presented oral arguments during a hearing. We affirm the refusal of registration.

² Registration No. 1,787,452, issued August 10, 1993, to Absolute Filtration, Inc. The registration includes a description of the mark which states: "The mark consists of the letters 'A & F' in a stylized design." According to Office records, a combined Section 8 affidavit and Section 15 affidavit was filed with the Post Registration Branch on October 23, 1998, although the combined affidavit does not appear to have been acted upon.

Our determination under Section 2(d) is based on analysis of all of the probative facts in evidence that are relevant to factors bearing on the likelihood of confusion issue. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of that issue in this case, key considerations are the similarities of the marks and the relatedness of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The Examining Attorney argues that, because the goods in the cited registration are described in broad terms, the description must be read to encompass the more specifically identified goods in applicant's application. Applicant has not disputed the argument and we find the Examining Attorney's conclusion on this point to be correct. We turn, then, to a comparison of the marks.³

Our inquiry focuses on whether applicant's mark and the registered mark, when viewed in their entireties, are

³ In comparing registrant's mark to applicant's mark, we note that applicant and the Examining Attorney do not agree on the particular elements comprising registrant's mark. The mark is variously described as "A-ampersand-F" or "A-plus-sign-F". While we do not dispute that a consumer viewing registrant's mark could perceive either an ampersand or a plus sign, we do not believe either symbol to be readily apparent. Nor do we find the mark description in the registration as clearly intended to establish that an ampersand is an element in the mark. Thus, for our purposes, when we compare registrant's and applicant's marks we compare a stylized "AF" mark with a typed "AF SERIES" mark.

similar in terms of appearance, sound, connotation and commercial impression. The test is not whether applicant's mark can be distinguished from registrant's mark when subjected to a side-by-side comparison but, rather, whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser of the goods, who normally retains a general rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). Moreover, we must consider the fallibility of human memory over time. See In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1468 (TTAB 1988). See also Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, dba Grandpa John's Store, 177 USPQ 573, 574 (CCPA 1973) (purchasers of retail services "do not engage in trademark dissection" they "merely recollect" marks).

The dominant portion of applicant's mark is identical to the stylized letters comprising registrant's entire mark. In applicant's mark, SERIES is disclaimed. While disclaimed matter must still be considered when marks are compared, "Series" is the subject of a disclaimer because

it is descriptive in relation to applicant's goods⁴ and is, therefore, less significant or dominant. See Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (CCPA) 1976). As a result, the AF portion of applicant's mark, which appears arbitrary in relation to the goods, is the dominant feature in determining the commercial impression created by the mark. It is well settled that, when comparing marks it is proper to give more weight to the dominant feature or element of a mark comprising multiple features or elements. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Applicant argues that registrant's mark is not an "AF" mark, but a visual mark with no ready pronunciation. The Examining Attorney, in contrast, argues that the mark would readily be perceived as consisting primarily of the letters "A" and "F".

In support of its position, applicant notes that the Trademark Manual of Examining Procedure [TMEP], in Section 808.03(a), informs examining attorneys that it is not necessary to require a description of a mark when the mark is composed of "easily recognized" letters, but that a description should be required when the letters in a

⁴ Material submitted by applicant reveals that it markets a wide array or "series" of its goods.

composite mark would be "difficult to ascertain".

Applicant concludes therefrom (in view of the instructions in the TMEP, and the existence of a mark description in the cited registration) that the examining attorney who required the registrant to include the description must have viewed the mark "as being composed of unascertainable component letters"; and further that the registrant acquiesced in this view by agreeing to the examiner's amendment which entered the description.

Applicant's argument that the mark would not be readily viewed by consumers as including the letters "A" and "F" does not convince us. The TMEP section relied on by applicant in partial support of the argument explains that the reason for including a description of a mark is to ensure proper cataloguing or indexing of the mark in the Trademark Search Library and automated search system. The examining attorney who reviewed the registrant's application may have readily viewed the mark as including the letters "A" and "F" but may have required the description solely to ensure proper placement of the mark in the search library and search system. In any event, the mental process of the examining attorney who handled registrant's application cannot be determined and, even if it could be, would not be binding on our assessment of

registrant's mark. We believe that the majority of those seeing registrant's mark would view the mark (as used in commerce) as containing the stylized letters "A" and "F", without need of a mark description or other key. We agree with the argument by the Examining Attorney in this case, that consumers faced with registrant's mark would have no other reasonable means of characterizing and remembering the mark other than as "AF." We believe consumers would employ this means because, while designs may be visually memorable, words and letters are more easily articulated and used to call for goods or services through oral or written communication.

While the respective marks are different in appearance⁵, when verbalized the dominant element of applicant's mark is the same as registrant's mark. Finally the connotation of the marks is the same. Since the marks are or will be used for goods that, for our analysis, are similar, and the marks are very similar but for their display, confusion among consumers is likely.

We are not persuaded otherwise by applicant's argument that if its mark is registered, protection of that mark would extend only to the letters and not to presentation of

⁵ Though applicant's application is based on intent-to-use, it has filed sales literature showing how it uses its mark.

the letters in a format "where the terms are not discernible," as in registrant's mark. Applicant's implied conclusion for this argument is that it should not be considered at all likely to present its mark in a form similar to registrant's. As noted, we do not view registrant's mark as a purely visual mark wherein the individual letters would be unrecognizable. Moreover, as noted by the Examining Attorney, applicant has not limited itself to a particular form of lettering or stylization and we must consider the possibility that applicant could readily adopt any number of forms that might be visually similar to that employed by registrant. See Sunnen Products Co. v. Sunex International Inc., 1 USPQ2d 1744, 1747 (TTAB 1987), *citing* Kimberly-Clark Corp. v. H. Douglas Enterprises, 774 F.2d 1144, 227 USPQ 541, 543 (Fed. Cir. 1985) ("[Applicant] seeks to register its mark without any special form of lettering or associated design. Therefore, a necessary premise in our evaluation of the registrability of applicant's mark is that the mark ... may be displayed in any form or style of lettering, or in any color, including the identical form, style or color used by [registrant].").

Finally, even if we were to assume that applicant would present its mark somewhat differently from registrant's, the degree of similarity between the marks

that is required to support a finding of likelihood of confusion when the goods are, as in this case, legally identical, is not as great as when there are differences in the goods. See Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We also are not persuaded by applicant's argument that confusion is not likely because registrant's mark is so highly stylized that consumers would have to look to registrant's name before they would perceive the letters in registrant's mark and, having done so, would be able to distinguish between registrant and applicant. Even if we assume that consumers would make this association between registrant's mark and registrant's name, those consumers, when subsequently confronted with applicant's mark, might readily draw an association with registrant. Applicant's mark does not include its company name and, according to applicant's own argument, it would not present its mark in a format wherein the letters AF would be so unrecognizable that consumers would have to compare applicant's mark to its name to be able to verbalize the mark. Thus, even consumers who conclude registrant's "AF" mark stands for Absolute Filtration might readily conclude that applicant's "AF SERIES" mark is a variation of registrant's mark.

The final argument we consider is applicant's contention that purchasers of the involved goods, which by their respective identifications only have industrial applications, are sophisticated and would not be confused. Suffice it to say that even sophisticated purchasers are not immune from confusion as to the origin of goods. See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Decision: The refusal of registration under Section 2(d) is affirmed.

R. F. Cissel

B. A. Chapman

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board